Book Review

Katherine Franke, *Wedlocked: The Perils of Marriage Equality—How African Americans and Gays Mistakenly Thought the Right to Marry Would Set Them Free*. New York: New York University Press, 2015, pp. 288, $35.00 (cloth).

Reviewed by Brian H. Bix

Katherine Franke's new book, *Wedlocked*, is part legal history, part reflection on legal and social reform. By the time one is done with the subtitle of the book, *How African Americans and Gays Mistakenly Thought the Right to Marry Would Set Them Free*, one already has a good sense of the book's basic thesis and general tone. The book juxtaposes[1] stories of the liberation of African-Americans during and just after the Civil War—emphasizing the access they then gained to legal marriage—with the recent movement for legal recognition of same-sex marriage.[2] Franke admits that she came to this project with a suspicion that the second admission to legal marriage would repeat the patterns of the first, but ultimately recognized that, at least in some important ways, it has not (5-6, 188, 197). She explores why this different outcome developed.

The early parts of the book relate horrible reports of what recently liberated slaves endured: Family members killed or beaten by former owners, or left to die by indifferent government troops and officials. For that group, the marriage laws at that time were used not to celebrate and dignify, but to harass, intimidate, and oppress (23-50, 117-43). The right to marry became just one more mechanism by which African-Americans could be regulated, supervised, and, in some cases, imprisoned.[3] Some of those instigating prosecutions were other African-Americans, former lovers, and abandoned spouses using the law to get back at those whom they perceived as having wronged them (163-81). Franke—a Columbia Law School professor—reasonably sees parallels with

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1. The book is careful to note that it is not "equat[ing] the two . . . . To this end, the book offers a juxtaposition rather than an analogy . . ." (11).

2. The book was completed before the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) came down. That case held that the Constitution required states to allow same-sex couples to marry. In the book, Franke predicted that a decision along those lines was probable (193).

3. Franke speculates that the legal harassment had among its primary purposes keeping African-Americans from voting and creating cheap convict labor (139-40).

more recent instances of former members of same-sex couples using the legal rules in states hostile to same-sex unions to keep their former partners from any contact with children that the couple had been raising together prior to the breakup.[4]

Wedlocked reminds us of important insights from the critical theory tradition: Rights are double-edged—at best—, equality often means meeting someone else's norm, and it may be easier to join an institution than it is to change it.[5] And backlash is inevitable when groups that are still oppressed or still despised gain legal and social rights and recognition (though Franke admits her surprise that the backlash against same-sex couples has not been greater (9)). However, Franke is not suggesting that groups should give up their efforts at law reform: "Rights are something we cannot not want" (50).

Many of Franke's horror stories arise from problems of transition: Former slaves were declared married without their knowledge or consent (129-39); California "upgraded" the legal status of domestic partnership same-sex couples into the equivalent of marriage, often without their knowledge or consent (144-50); a judge ruled property acquired long before marriage to be part of marital property for a same-sex couple, on the dubious basis that the couple would have married earlier if they could have (210-12); and same-sex married couples in prior years were unable to divorce because divorce requires domiciliary status—while marriage does not—and the state(s) in which the couple were domiciled did not recognize same-sex unions (155). Most of these are problems associated with transitioning between periods when marriage was not available at all, or available only in some places. They should fade away for same-sex couples as we move forward, with their right to marriage now established across the country.

One of Franke's more controversial claims is that the same-sex marriage movement succeeded in part because gays managed to displace their stigma onto African-Americans (115, 188, 206, 227). This is related to a separate claim that gay rights had been portrayed, or had managed to portray itself, as "white" (62, 113-14, 198, 205). These are provocative assertions, and obviously hard to prove even without space limitations. With a mere handful of paragraphs given to the claims in *Wedlocked*, those not already persuaded are unlikely to be won over.

The book is skeptical about marriage. It portrays marriage as "enduringly gendered."(6). The author views marriage as regulated in a way that reflects the circumstances of women historically in a sexist society—as mollified only somewhat by recent feminist-inspired law reforms. Franke is equally suspicious of government in general: She asks why same-sex couples would

4. *See, e.g.*, *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008), *cert. denied*, 555 U.S. 1069 (2008); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007).

5. *See, e.g.*, Morton J. Horwitz, *Rights*, 23 Harv. C.R.-C.L.L. Rev. 393 (1988); Martha Minow, *Foreword: Justice Engendered*, 101 Harv. L. Rev. 10 (1987); Catherine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 Yale L.J. 1281 (1991).

"clamor to have the state regulate our romantic lives" (9). She is critical of the litigation strategy of those fighting for same-sex marriage, concerned that their arguments too often depended on equating state recognition of relationships with legitimacy (*e.g.*, 10), and on valuing marriage in a way that denigrated nonmarital family forms (113).

Franke is also concerned that gay rights succeeded only by taking the sex out of homosexuality (227); that gay advocates moved from asserting a right to unconventional sexuality to portraying gays as dignified partners in seemingly sexless long-term partnerships (61). She argues that both African-Americans—both before and after liberation from slavery—and gays—both before and after the legal recognition of same-sex marriage—had a variety of romantic, marital, and family/kinship forms, all of which were largely suppressed when the communities chose, or were forced into, the single form of conventional marriage (63-64, 89, 109-10). The same-sex marriage movement is criticized for not seeking to build up—and, in fact, denigrating—alternative marital forms existing in some states—"civil unions" and "domestic partnerships." Franke observes that it had been central to the litigation strategy to argue that these forms were inadequate and demeaning to same-sex couples, and that only access to marriage would constitute equal and dignified treatment for such couples (107-08).

Wedlocked advocates recognition and respect for a variety of marriage and family forms (223, 231).[6] The basic argument is that (many) gay couples have different conventions, expectations, and values than do most opposite-sex couples—e.g., regarding sexual fidelity during the relationship and financial support afterwards (152-53, 215-17). This connects with a slight hope that same-sex couples might help to transform marriage (214-17, 226)—though on the whole, Franke seems to find this unlikely.[7] At times, the book's argument appears to be more general: It posits that every couple —same-sex or opposite-sex—is unique, and should have the right, through premarital agreements, to structure the terms of their union as they think best.

On one hand, it is certainly true that the rights, duties and protections of marriage do not fit the interests and needs of all couples equally well. And Franke is likely correct that many of the rules relating to marriage come out of traditional and sexist views about gender roles, and that many recent legal reforms of marriage reflect the general vulnerabilities that traditional marriage and traditional gender roles produce. On the other hand, there are no obvious, easy solutions to the problem of marriage laws not fitting all couples equally well. Proposals along the lines of a variety of marriage/family

6. *See also* Nancy D. Polikoff, Beyond Straight and Gay Marriage: Valuing All Families Under Law (2008).

7. Though she does add an appendix specifically on the topic: "A Progressive Call to Action for Married Queers" (233-35).

forms or individual contracting[8]—neither idea, of course, is entirely new[9]—are attractive, but there is a concern that the availability of additional options simply pushes the problem of vulnerable parties back one step: How can we prevent vulnerable parties from being coerced or manipulated into family forms that leave them powerless, dependent and impoverished?[10] A second question: If parties were to have plenary power to determine the financial—and nonfinancial—terms of their marriage (*cf.* 218), then why marry? What would marriage mean and what would it add if parties had plenary power to set or alter the terms of that status?

Franke is aware of many of these issues, but—unsurprisingly—offers no magical solution that will avoid all problems. She recognizes that while any set of general rules for marriage will apply too broadly, allowing all parties to select their own terms will lead in some cases to exploitation and oppression. She recognizes that there will be vulnerable parties—and not all of them will be wives in traditional opposite-sex marriages. She notes that judges may not be in the best position to evaluate the balance of power in relationships, nor to set the limits of tradeoffs between liberty and equality (221). Still, not everyone will be persuaded that complete *laissez faire* would be a better alternative. At times, Franke suggests that only those willing to take on all the current terms of marriage should marry, as too much strain in seeking to enforce unconventional "side deals" could undermine the progress feminists have achieved in reforming the rules and terms of marriage (222-23).

Wedlocked is a thoughtful and important reflection on the history of social movements, the place of marriage in movements for social reform, and the light this history brings to whatever may come next. The book reminds us of how new rights can lead to backlash. By the same measure, it reveals how the

8. Most references to contracting in this context—including in this book—relate to contracting before the union —*i.e.*, premarital agreements—to cover the union itself, the consequences of its ending, or both. Franke also notes in passing (209) the possibility of just leaving the consequences of breakup to negotiation *at that time*—as contrasted either with contracting in advance or the state's imposition of its own default rules.

9. On the idea of making multiple family forms available, see, *e.g.*, Polikoff, *supra* note 6; Larry E. Ribstein, *A Standard Form Approach to Same-Sex Marriage*, 38 Creighton L. Rev. 309 (2005) (suggesting choice of law and standard business forms approaches to marriage); Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 Creighton L. Rev. 337, 344-49 (2005) (same); Shahar Lifshitz, *The Pluralistic Vision of Marriage*, in Marriage at the Crossroads 260-84 (Marsha Garrison & Elizabeth S. Scott, eds., 2012) (advocating for a variety of state-supported "affiliative institutions"); *cf.* Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies (1995) (arguing for state recognition of the mother-child dyad in the place of recognizing sexual unions).

10. These are questions that have long been present in reflections on when and whether to enforce premarital and marital agreements. *See, e.g.*, Brian H. Bix, *Private Ordering and Family Law*, 23 J. Amer. Acad. Matrimonial L. 249 (2010); Brian H. Bix, *Bargaining in the Shadow of Love: Premarital Agreements and How We Think About Marriage*, 40 Wm. & Mary L. Rev. 145 (1998). I have also seen the problem from the perspective of drafting proposed legislation in the area, this as the Reporter for the Uniform Premarital and Marital Agreements Act.

use of the rights against the interests of the right-holders (in this case, marriage and liberated African-Americans and gays) can raise its own set of problems.

Similarly, admission to institutions from which a group was previously excluded (here, marriage) can be complicated, as the institution can remain unfair and constricting. And *Wedlocked* raises in provocative ways long-standing issues regarding whether the state should recognize a range of family forms, and whether parties should be able to set the financial and nonfinancial terms of their intimate unions.